Supreme Court, U.S.
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No. 01-686

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE THE NEW YORK STATE ASSOCIATION FOR SOLID WASTE MANAGEMENT IN SUPPORT OF RESPONDENTS

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Other Authorities:

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Diederich, *In Light of Carbone: Who Owns Municipal Solid Waste?*, The New York Environmental Law Report (April 1995) 1

Diederich, *Keep Democratic Rule over Trash*, ABA Section of Natural Resources, Energy and Environmental Law, Nov./Dec. 1994 ..... 1, 2

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L. TRIBE, AMERICAN CONSTITUTIONAL LAW 397 (2d ed. 1988) 2

WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992) 7

The New York State Association for Solid Waste Management ("Association" or "NYSASWM") submits this brief as *Amicus Curiae* opposing the petition for *certiorari*.

Consent of Parties

Petitioners and respondents have consented to the filing of this brief, amicus curiae.[1]

Interest of the Amicus

The Association is a nonprofit organization of governmental and municipal citizens and entities involved in the public management of municipal solid waste. The Association's brief in the court below was adopted in substantial part by the Second Circuit in the *United Haulers*[2] decision below. The Association, its members and its counsel are interested in principled, economically sound, and environmentally protective management of municipal solid waste in the public interest.[3]

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1. In accordance with Rule 37, the parties' letters of consent have been filed with the clerk of this Court, and this brief was authored alone by counsel, *pro bono publico*, for the *amicus* herein, with neither contribution on the brief nor financial contribution from any party.

2. *United Haulers et al. v. Oneida-Herkimer Solid Waste Management Authority, et al.*, 261 F.3d 245 (2d Cir. 2001).

3. Some articles describing why non-discriminatory flow control laws will benefit the public, by allowing democratic and constitutional "home-rule" over trash, include: Diederich, *Can Municipalities Manage Their Own Solid Waste?*, Environment Magazine (May 1995); Diederich, *In Light of Carbone: Who Owns Municipal Solid Waste?*, The New York Environmental Law Report (April 1995); Diederich, *Keep Democratic Rule over Trash*, ABA Section of Natural Resources, Energy and

(Cont'd)

It is the belief of your *amicus* that it is vital to the public interest that the decision of the Second Circuit be left to stand.

Argument Opposing Certiorari

There are three points crucial to this Court's decision whether or not to grant certiorari.

A. No Conflict with Carbone

First, is whether the United Haulers decision conflicts with this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and thus violates the dormant aspect of the Commerce Clause.[4] As discussed within *United Haulers*, it most certainly does not.

Respectfully, it becomes obvious reading the majority and dissenting opinions that the debate among the Justices of this Court in *Carbone* was whether the facility being "favored" by local regulation was public (in which case the "flow control" would be permissible), or whether the regulation discriminated in favor of local business enterprise (and thus impermissible under this Court's "local grab" Commerce Clause jurisprudence[5]).

(Cont'd)
Environmental Law, Nov./Dec. 1994; Diederich, *Does Garbage Have Standing?—Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993).

4. U.S. CONST., art. I, § 8.

5. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-9, p. 426 (2d ed. 1988).

It is basic law that State and local governments can provide monopoly public service. Whether such service is the provision of police or fire protection, educating children in public schools, or providing a public water or sewerage system, such governmental monopoly service does not infringe upon interstate commerce. Petitioners' attempt to label a fundamental police power activity—sanitation—as a business enterprise misinterprets the very nature and essential role of government.

The basic right of government to provide monopoly public service formed the theoretical underpinning of the debate among the Justices in *Carbone*. The distinction between monopoly public service and private commercial activity is not of minor dimension. Rather, it is the difference between a police force or private security service; public or private schools; public sewer or private septic systems; a fire department or some form of private fire control business. It is the difference between government acting to protect its citizens, and the citizenry or business undertaking this task on their own.

The Second Circuit explained, in this regard, how this Court's "local grab" jurisprudence supported the distinction between the public protecting itself by preferring its own waste management facilities (or through fair, open and competitive outsourcing), in contrast to government using regulation to "grab" business for local industry.

The Second Circuit describes the public self-management process as a "bottleneck." This can be visualized as governmental self-management within the bottle until such time as the Government allows the waste to exit (or flow) out of the municipal bottle and into the channels of interstate

commerce. In your *amicus* Association's brief in the Second Circuit, this "bottleneck" was depicted as a flow chart illustrating how municipal solid waste can be permissibly managed under the constraints of the Commerce Clause. *See* annexed Figure "1" attached as an Appendix hereto (indicating the "bottleneck" described by the Second Circuit). The flow diagram shows the "bottleneck" of monopoly public control of solid waste, and the option of outsourcing where local government "openly and competitively" employs the private sector (*e.g.*, *Harvey v. Harvey*;[6] *Houlton*[7]). The flow diagram also indicates that government can permissibly use the "market participant" exception (*e.g.*, *SSC Corporation*[8]), but that it is impermissible for government to use its regulatory powers to favor local industry (*Carbone* & "local grab" cases).

Thus, the court below wrote a decision fully in accord with this Court's Commerce Clause jurisprudence, which decision must be left to stand.

B. No Split among the Circuits

Petitioners second argument—that a split of decision exists among the circuits on the issue of governmental flow control—is unsupported. The *United Haulers* decision sets forth the relevant decisions, and amply demonstrates that no circuit has directly addressed this point, namely, the issue of

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6. *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996).

7. *Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999).

8. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 517 U.S. 1150 (1996).

whether governmental self-management of local solid waste violates the Commerce Clause. Moreover, two of the decisions which petitioners cite in support of a split among the circuits *pre-date Carbone*, and employ a "waste-is-an-article-of-commerce" rationale which was presented to, but not adopted by the Court in *Carbone*.[9] The case below is the only appellate decision which directly addresses and analyzes the question of flow control of a community's solid waste to its own public facilities.[10] This Court should give other circuits the opportunity to follow the *United Haulers* precedent, in which case there may be no need for this Court's involvement.

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9. Rather, such rationale was rejected by this court, by its acknowledgment that it is not so much the trash itself which is the commerce, but rather the service of processing it. *See Carbone*, *supra*, 511 U.S., at 391; *see also Does Garbage Have Standing*, *supra*, note 1, at introductory summary (which article analyzes a line of cases, some cited by petitioners, which base their decision on the false notion that trash is in and of itself an "article of commerce." *See, e.g.*, *Waste Systems Corp v. County of Martin*, 985 F.2d 1381 (8th Cir 1993) and *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D.Ala 1993), *aff'd, without opinion*, 29 F.3d 641 (11th Cir. 1994)).

10. The Second Circuit could also have employed other or additional reasoning to reach the same result: It could have asked the question "Who owns the trash?" with the answer being the local public, which is then entitled, through its public bodies, to keep control of such trash to self-manage it. In a similar vein, it could have applied principles of democracy, to allow the local public the choice to self-manage its own trash, as is arguably its federal right under the Guarantee Clause. *See* note 3 *supra*.

C. Fundamental, and Constitutional, Police Power Activity

Thirdly, because the instant case involves local government managing its own citizens' municipal solid waste, there simply is no question of protectionism in favor of local enterprise. Instead, there is the right of the public, under principles of both federalism and democracy (embodied in the Constitution's Guarantee Clause[11]), to manage its waste problems locally. Self-management of local garbage is a traditional and fundamental police power activity. It is essentially no different from using a police or fire department , a public school, sewer district to manage local crime, fire, illiteracy or human waste. The solid waste management system at issue can be likened to a sewer system, with the local solid waste haulers taking the role of the sewer pipes.

Moreover, public self-management of a community's solid waste—discarded material which is essentially a form of pollution—cannot be viewed as an infringement upon interstate commerce. Rather, what is involved is government managing local waste in a manner beneficial to the local citizenry, which self-management is also beneficial to neighboring communities and States, and is fully consistent with the policies and mandates which Congress set forth in RCRA subtitle D.[12]

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11. The assurance of State and local democracy can be viewed as embodied in the Guarantee Clause, promising to the States a "republican form of government." *See* U.S. Const. art. IV, § 4.

12. *See* Resource Conservation and Recovery Act § 1002 *et seq.*, 42 U.S.C. § 6901, *et seq.* (1988 & Supp. III 1991) [hereinafter "RCRA"]

Allowing governmental management of local waste will not cause the sky to fall. Petitioners' "sea change"[13] argument is belied by the fact that here government is merely performing a police power activity which municipal entities have undertaken by necessity through the ages—public sanitation. The decision below allows government to perform its essential and historically proven role.[14] Trash management is, after all, a paradigmatic police power activity.[15]

Congress has endorsed this governmental role. It is a role which protects the public interest, for if *every* community self-managed its own municipal trash so as to totally eliminate the existence of trash, the federal goals of RCRA would be obtained, and every community would benefit and applaud such achievement. No interstate "jealousies" would be excited. If every community adopted Respondents' comprehensive system, the nation would achieve better, environmentally sound and economically efficient trash

13. No "sea change" will occur if the decision below is left to stand. *Cf.*, Petition at p. 22. For example, the City of New York collects over 12,000 tons of residential trash per day, using Sanitation Department trucks. The decision below will not give New York City greater power than the public service monopoly it has always enjoyed.

14. *See generally*, WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992).

15. *See, e.g., Hybud Equip. Co. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931, *cert. denied*, 471 U.S. 1004 (1985) ("[C]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment . . . [and which ordinances] are rationally related to a matter of legitimate local concern.").

management, in complete harmony with the Commerce Clause and consistent with principles of federalism and democracy.

CONCLUSION

The decision below, upholding the State and local laws at issue, is consistent with principles of federalism by allowing democratic choices regarding local trash management and disposal. The laws at issue do not discriminate against or impede interstate commerce. Thus, the petition for *certiorari* must be denied.

Respectfully submitted,

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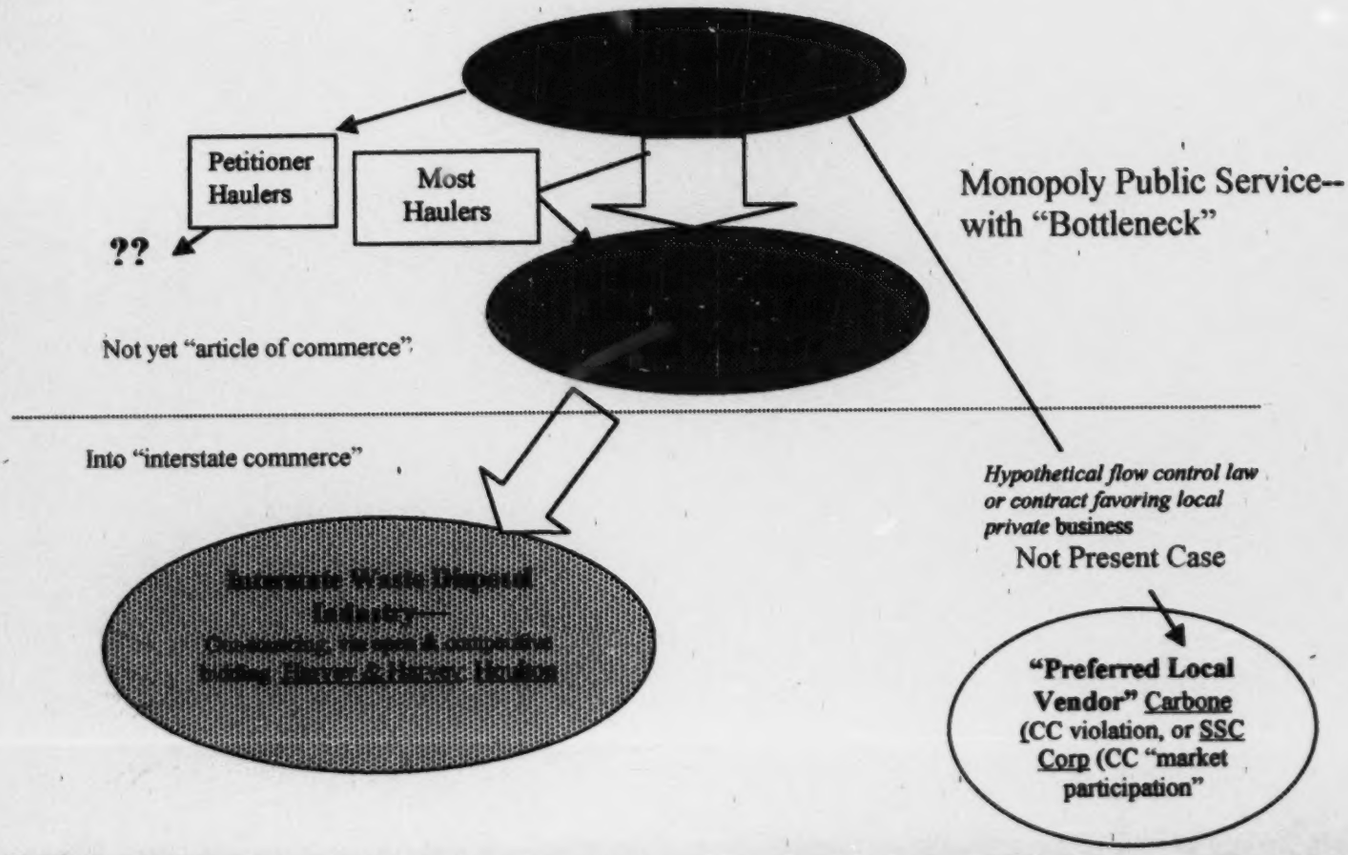
APPENDIX

BEST AVAILABLE COPY

Waste Flow Diagram **– *Fig. "1"***


Petitioner Haulers
Most Haulers
??
Monopoly Public Service-- with "Bottleneck"
Not yet "article of commerce"
Into "interstate commerce"
Hypothetical flow control law or contract favoring local private business
Not Present Case
"Preferred Local Vendor" Carbone (CC violation, or SSC Corp (CC "market participation"